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IN THE

Supreme Court of the United States

MCKESSON HBOC, INC., et al.,
Conditional Cross-Petitioners
v.
ISLAMIC REPUBLIC OF IRAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

McKesson's Reply Memorandum Regarding the Conditional Cross-Petition

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, McKesson HBOC, Inc. states that it is a publicly-owned company. It has no parent and there is no publicly-held company that owns 10 percent or more of McKesson's stock.

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REPLY MEMORANDUM REGARDING THE CONDITIONAL CROSS-PETITION

I. IF THE COURT CHOOSES TO REVIEW THIS CASE AT ALL, IT SHOULD REVIEW ALL OF THE QUESTIONS PRESENTED BY BOTH PARTIES, INCLUDING THOSE RELATING TO SUMMARY JUDGMENT.

The Solicitor General, writing on behalf of the Overseas Private Investment Corporation ("OPIC"), has agreed with McKesson[1/] that Iran's petition for certiorari should be denied. *See* Brief of the Overseas Private Investment Corporation in Opposition ("OPIC Opp.") at 9. The Solicitor General also has agreed with McKesson that if the Court were to grant review of any of the four questions presented by Iran's petition, it also should review the second question presented in McKesson's conditional cross-petition, *i.e.*, the question concerning the lower courts' denial of compound interest. *See id.* at 26.

The Solicitor General also has contended, however, that the Court should review the first question presented in the cross-petition (*i.e.*, the question dealing with the court of appeals' reversal of summary judgment as to liability) only if it grants review on Iran's Question 4. *See* OPIC Opp. at 26-27. The government thus suggests the possibility that this Court might wish to grant review on one or more of Iran's first three issues but not on the summary judgment questions raised in the petition and cross-petition. Such an outcome should be avoided. It would assist neither the parties nor the Court.

1/ "McKesson" refers to the Conditional Cross-Petitioners: McKesson HBOC, Inc., Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Iran Corporation.

Reviewing the other issues raised by the petition and cross-petition inevitably will require the Court to examine the record of the proceedings below and the facts of the case. Iran's jurisdictional arguments, for example, focus on the place of payment of certain dividends owed to McKesson that Iran has refused to pay for more than twenty years. *See* Pet. at 14-20. These same dividend payments are central to the parties' summary judgment dispute. *See id.* at 20-25; Cross-Pet. at 9-23; *see also* PA 11a-15a.[2/] If the Court decides to address Iran's jurisdictional issues, it necessarily will need to review the very record facts that bear on the court of appeals' summary judgment ruling. In these circumstances, a limited grant of review is not warranted.

That is especially so given the potential of the summary judgment questions to resolve the case in its entirety. For example, if the Court were to grant review only on one or more of Iran's jurisdictional issues, and then affirm the judgment below, the result would be a second trial in the district court, this time on Iran's "come to the company" defense, followed undoubtedly by at least one further appeal and petition for review in this Court. These additional proceedings might become entirely unnecessary, however, if the Court were to grant review of the summary judgment issues as well. In that event, further proceedings could be avoided, despite affirmance of the courts below on all other issues, if the Court were either to reinstate the summary judgment of the district court on the issue of liability, or to reverse both courts below and award summary judgment to Iran. Thus, by reviewing all of the questions presented, if it chooses to review any of them at all, this Court can maximize the efficient use of its resources and minimize the likelihood that another trial will be necessary.

2/ "PA" refers to the appendix to Iran's Petition.

There is still a further reason why granting review only on one or more of Iran's jurisdictional issues would be inadvisable. None of those questions divided the courts below. It was only on the issue of whether McKesson was entitled to summary judgment that the district court and the court of appeals disagreed. In such circumstances, if this Court is inclined to consider any of the issues on which the courts below agreed, it should also address the potentially dispositive question on which they differed.

II. IF THE COURT GRANTS IRAN'S PETITION, IT SHOULD ALSO REVIEW MCKESSON'S COMPOUND INTEREST ISSUE.

A. The Lower Courts' Denial Of Compound Prejudgment Interest Raises Important Issues That Are Closely Related To Those Raised By Iran's Petition.

Iran contends that, even if its petition is granted, the Court should decline to review the compound interest question presented by McKesson. As the government has recognized, however, the compound interest issue depends in part on the source of governing substantive law, and on the appropriate interaction between customary international law and federal law, the very kinds of issues that would be implicated if the Court were to grant review on any of the first three questions presented by Iran. *See* OPIC Opp. at 29. If the Court determines, contrary to our view and the Solicitor General's, that it is necessary to consider any of these issues now, then it also should grant review of the compound interest issue.

This is particularly true in light of the importance of the compound interest issue, not only to this case but to the effective and consistent administration of justice in the federal courts generally. We recognize, as the Solicitor General notes, that the court of appeals' decision leaves this

case at an interlocutory stage and that the compound prejudgment interest issue would be preserved for review at a later date, if necessary. *See* OPIC Opp. at 9, 27. Indeed, it was for this reason that McKesson chose not to seek independent review of the issue at this time. We cannot agree, however, with the Solicitor General's characterization of the issue as an unimportant one. *See id.* at 27.

First, the court of appeals' determination that the district court had acted within its discretion was not, in the Solicitor General's term, "fact-specific." OPIC Opp. at 27. Indeed, that is precisely what was wrong with the decisions by both courts below: they ignored the facts of this case, and focused instead on what other bodies that are not federal courts, applying standards other than federal common law or customary international law, had done in other cases.

Second, as this case illustrates, the difference between compound prejudgment interest and simple prejudgment interest can be immense. The determination of which measure of interest to award, therefore, can have tremendous consequences for litigants in any case that, like this one, is complex and may take years to resolve. The lack of analysis exhibited by the courts below, their confusion concerning the applicable standard, and their ultimate denial of compound prejudgment interest to a plaintiff deprived of its property for more than twenty years by a defendant that has used every procedural device imaginable to delay judgment, sets a terrible precedent and must cause serious concern to any litigant embarking on a suit for damages in the federal courts, particularly one against a foreign state. The issue, therefore, is an important one that warrants independent review by this Court, if not now, then after McKesson has succeeded in having its judgment as to Iran's liability reinstated.

B. Iran's Compound Interest Arguments Relate Only To The Merits Of The Issue And Provide No Basis For Denying Review.

McKesson's argument for review of the compound interest issue consists essentially of five related points:

(1) If there a were a rule of customary international law governing the award of compound prejudgment interest, that rule would apply here;

(2) There is no rule of customary international law governing the award of compound prejudgment interest;

(3) Where, as here, a rule of customary international law is lacking with respect to an issue that otherwise would be governed by customary international law, federal courts must apply federal common law standards;

(4) In exercising their discretion to grant or deny compound prejudgment interest, federal courts should consider what is required to make the plaintiff whole under the facts and circumstances of the case, and compound prejudgment interest is the norm in federal litigation; and

(5) The district court ignored the facts and circumstances of this case in denying compound prejudgment interest, and instead relied entirely on what the Iran-U.S. Claims Tribunal and U.S. Foreign Claims Settlement Commission -- applying different standards, dictated by different circumstances, to cases with different facts -- have traditionally done in denying compound prejudgment interest.

See Cross-Pet. at 23-29. Thus, McKesson argued, the district court's decision, and the court of appeals' opinion affirming

it, ignored well-established principles of federal law on issues of vital importance to civil litigants in a wide range of cases, and thus presented an issue suitable for review by this Court. *See id.*

Iran does not appear to contest McKesson's first point, *i.e.*, that a customary international law rule would govern if such a rule existed. Iran Opp. at 16-17. On the second point, however, Iran asserts that the court of appeals recognized as a "settled principle" of customary international law a statement by Iran's expert, James Crawford, to the effect that compound prejudgment interest should not be awarded absent special circumstances. Iran Opp. at 18. But the court of appeals never said or even suggested that Crawford's view constitutes a "settled principle," much less a rule of customary international law that the district court was obliged to apply. *See* PA 17a-19a. For such a rule to exist, there must be virtual unanimity in the practice of sovereign states. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995). Far from recognizing that such unanimity exists, the court of appeals acknowledged that, although the Iran-U.S. Claims Tribunal has never awarded compound interest, other international tribunals have. PA 18a. The court of appeals considered Crawford's view to be that of "most contemporary sources," but the court did not say that that view has been adopted by states to the extent required for a customary international law rule. Mr. Crawford himself plainly did not regard the "special circumstances only" view as a rule of customary international law; he provided Iran with an expert opinion in support of its argument (which the court of appeals rejected) that customary international law *requires* simple interest. *See* Appellant's Reply and Cross Appellee's Brief at 55 & Exh. 1 (Opinion of James Crawford, dated June 11, 2001).

On McKesson's third point, that federal law governs when a customary international law rule is lacking, Iran

merely observes that the cases McKesson cited for this proposition did not involve the availability of compound prejudgment interest. Iran Opp. at 18-19 & n.10. This is true, but irrelevant. The principle for which McKesson cited these cases is one of general application, and is not restricted to instances in which the missing customary international law rule pertains to compound prejudgment interest, or to any other specific issue. Nor is there any basis for treating cases involving compound prejudgment interest any differently, for purposes of determining what law governs, than cases involving any other issue as to which there is no applicable rule of customary international law.[3/]

In response to McKesson's fourth point, Iran complains that McKesson did not cite a sufficient number of cases to support its argument that federal common law includes a strong presumption in favor of compound prejudgment interest. Iran cites no contrary cases, however, and also ignores the fact that McKesson did not cite these cases merely to illustrate the presumption; one of them, as McKesson emphasized, flatly states that "'*compound prejudgment interest is the norm in federal litigation.*'" *See* Cross-Pet. at 24 (quoting *Amoco Cadiz*, 954 F.2d at 1332) (emphasis added). Nor does it matter that, as Iran points out,

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3/ Iran cites *Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992), for the proposition that customary international law, not federal law, controls because the "'[r]ules for prejudgment interest . . . usually come from the law defining the elements of damages.'" Iran Opp. at 19, 23. Although the Seventh Circuit's observation appears unobjectionable, it provides no help on the issue here, which is what law controls when "the law defining the elements of damages" contains no applicable rule regarding prejudgment interest. This issue was not presented in *Amoco Cadiz*; as Iran itself acknowledges, the court in that case applied British law, which does contain a rule concerning the availability of compound prejudgment interest. 954 F.2d at 1135-36.

only one of the cited cases "involved foreign parties." Iran Opp. at 19. The nationality of the parties is irrelevant to the principle for which McKesson cited these cases: that federal common law contains a presumption in favor of compound prejudgment interest.

Iran disputes McKesson's view that the proper exercise of discretion on the issue of compound interest requires federal courts to consider what is required to make the plaintiff whole under the facts and circumstances of the case. Iran makes too much of the court of appeals' comment that "some" federal common law principles require courts to make the plaintiff whole. Iran Opp. at 20. The court's use of the word "some" does not imply, as Iran asserts, that there must be other federal common law principles that look in the opposite direction. Rather, it reflects only the obvious fact that not all federal common law principles have any bearing on the subject of making plaintiffs whole. Iran has not even suggested, much less identified, any legal principles at all, federal or otherwise, that counsel against making plaintiffs whole.

On McKesson's fifth point, finally, Iran says that the district court's reliance on the "consensus" in international law against compound interest was "not only proper," but was "'required'" here because the case was brought under customary international law. Iran Opp. at 24. As the court of appeals recognized, however, there is no "consensus" in customary international law against compound interest; that is why there is no customary international law rule requiring simple interest. *See* PA 17a-18a. Because there is no customary international law rule, federal law governs; with respect to the compound interest issue, the fact that the case was brought under international law is relevant only to the academic question of what law would apply in the hypothetical event that a customary international law rule existed.

CONCLUSION

If the Court grants Iran's petition for a writ of certiorari, the conditional cross-petition also should be granted.

Respectfully submitted,

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